

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

PP Docket No. 93-253

COMMENTS OF FIBERSOUTH, INC.

FiberSouth, Inc. ("FiberSouth"), by its undersigned counsel, hereby submits its comments in response to the Federal Communications Commission's ("FCC" or the "Commission") Notice of Proposed Rulemaking to establish rules for awarding licenses for radio spectrum by competitive bidding.^{1/}

I. STATEMENT OF INTEREST

FiberSouth is a newly organized, entrepreneurial competitive access provider based in Raleigh, North Carolina. FiberSouth is in the process of building a 45-route-mile fiber optic network to serve the Raleigh, Durham, Cary, and Research Triangle Park area. FiberSouth's fiber optic network will provide connections between interexchange carriers' points of presence and connections between large volume users and interexchange carriers'

^{1/} *In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding, Notice of Proposed Rulemaking, PP Docket No. 93-253, (released October 12, 1993) (the "Notice").*

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points of presence. FiberSouth believes that using its competitive access network as a platform for its PCS network will reduce its construction costs and PCS prices for consumers served by FiberSouth. Accordingly, FiberSouth intends to bid for a PCS license as a small business.

The competitive bidding rules adopted by the Commission will be first used to award PCS licenses and will determine whether small businesses, such as FiberSouth, will be afforded a meaningful opportunity to participate in PCS. Accordingly, FiberSouth's comments are limited to the Commission's proposals for small businesses. Specifically, these comments address four issues of critical importance to small businesses: (1) valuation of the net worth of businesses seeking designation as a small business; (2) the commencement date for installment payments of bids; (3) the need for clarification that small businesses will not be required to make a pre-auction deposit to participate in the auctions; and (4) the need for a grace period for small business PCS licensees to cure defaults in bid payments to the government.

II. VALUATION OF THE NET WORTH OF SMALL BUSINESSES FOR COMPETITIVE BIDDING PURPOSES SHOULD RELATE BACK TO THE DATE OF THE COMMISSION'S ADOPTION OF THE FINAL REPORT AND ORDER ON PCS

The threshold issue that will determine whether small businesses have a future in offering licensed, spectrum-based services, including PCS, is the definition of small business. In authorizing the FCC to use competitive bidding as method of issuing licenses, Congress required the Commission to develop competitive bidding rules that disseminate licenses among a wide variety of applicants including small businesses and to ensure that small

businesses are given an opportunity to participate in the provision of spectrum-based services.^{2/} Specifically, the FCC proposes to use the Small Business Administration's ("SBA") net worth/net income test to identify small businesses. This net worth/net income test would allow competitive bidding applicants to qualify as a small business if their (1) net worth does not exceed \$6.0 million, and (2) average net income after federal income taxes for the two preceding years does not exceed \$2.0 million. While the Commission's proposal specifies the relative timeframe for evaluating net income, it is silent on the date of valuation of an entity's net worth.

FiberSouth believes strongly that valuation of the net worth of an applicant seeking to qualify as a small business for the purpose of bidding for a PCS license should relate back to the date of the Commission's adoption of the final Report and Order in the PCS docket, namely September 23, 1993.^{3/} Using this date as the cut-off date of valuation of net worth rather than a later date, such as the date of the auctions, will enable small businesses to raise capital in the financial markets, to finance their bid for a PCS license and to construct a PCS network without jeopardizing their preferred status as a small business. Small businesses bidding on even second tier markets will need to acquire capital that easily could exceed the \$6.0 million benchmark established by the SBA.

^{2/} See, generally, 47 U.S.C. § 309(j) (1993).

^{3/} See, generally, *Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order*, GEN Docket No. 90-314 (released October 22, 1993) ("PCS Order"). This also is the date of adoption of the Commission's proposals for the award of licenses by competitive bidding.

Valuation of net worth as of a date after adoption of the PCS Order, such as the auction filing window, will unnecessarily restrain the capital-raising efforts of small businesses. Successful small business strategies for raising capital should be encouraged by the competitive bidding rules not discouraged. Valuating small companies as of the date of adoption of the PCS Order will enable small businesses to compete for PCS licenses by providing a reasonable test to determine the authenticity of the size of the business while at the same time providing these businesses with the flexibility to obtain adequate financing.

The use of this date also addresses the FCC Small Business Advisory Committee's concern that the existing net worth/net income size standard is too low. By permitting upward flexibility in net worth following the date of adoption of the Commission's PCS Order, small businesses will be able to deploy all of their resources to raise the capital necessary to finance the purchase of PCS licenses and the cost of constructing PCS networks. Even companies, such as FiberSouth, that will be able to reduce their capital costs by making effective and efficient use of existing network infrastructures will still incur extensive construction costs in the initial years of operation.

Lastly, adoption of this valuation date will weed out applicants that alter their structure to fit the FCC's rules merely to take advantage of the bidding policies proposed for small businesses. These "speculators" with a net worth in excess of \$6.0 million should not be permitted to take advantage of benefits intended for small businesses by manipulating their net worth after the Commission's adoption of the rules for PCS and adoption of the FCC's proposals for competitive bidding.

III. INSTALLMENT PAYMENTS BY SMALL BUSINESSES SHOULD BEGIN IN THE THIRD YEAR OF THE LICENSE TERM

The Commission proposes to permit small businesses to pay their winning bids in installments to implement Congress' directive that the FCC's competitive bidding rules provide opportunities for small businesses to participate in spectrum-based services, including PCS. The Notice does not specify the structure, timing or duration for the installment payments other than to propose that the interest rate be set at the prime rate plus 1%.

FiberSouth requests that the Commission flesh out its proposal for installment payments and proposes that the Commission establish that a first installment payment not be due until the beginning of the third year of the license term. Licensed PCS will require the expenditure of funds not only for spectrum but also for construction of the PCS infrastructure. Even if an existing network, such as a fiber optic competitive access network is used as the backbone, PCS providers will incur significant costs in deploying base stations and other components of the network infrastructure. Initially, small business PCS licensees will need to devote most of their capital resources towards network construction and deployment. Early network deployment will be important to capture a portion of the PCS market that could be sought after by as many as seven PCS licensees in one market and by the existing cellular providers.

Furthermore, until the network is operational, the licensee will not have a revenue stream. Commencement of the installment payments in the third year of the license term will enable the small business PCS licensee to begin to generate revenues and place the PCS licensee in the best posture to compete and pay its bid price in full. By beginning the installment payments in the third year, small business PCS licensees will have greater

prospects for success. This success will inure not only to the benefit of the public through diversity in service offerings and new job creation but also to the benefit of the federal government by facilitating the full payment of the bid price rather than forfeiture of the license.

IV. THE COMMISSION SHOULD CLARIFY THAT SMALL BUSINESSES DO NOT HAVE TO PAY A DEPOSIT AS A PRE-CONDITION TO PARTICIPATING IN THE SPECTRUM AUCTIONS

FiberSouth also requests that the Commission clarify in its final competitive bidding rules that the pre-auction deposits proposed by the Commission as pre-condition to bidding in the auctions, generally do not apply to small businesses, women and minority-owned businesses and rural telephone companies (collectively "designated entities"). In the Notice, the relationship between the two proposals is unclear. The payment of a pre-auction deposit is inconsistent with the proposal for installment payments of the bid price. The requirement of payment of a deposit without an assessment of the ability to pay the deposit as a pre-condition for bidding would restrict severely those companies that are eligible to bid as "designated entities." If the Commission determines that designated entities should pay a pre-auction deposit, the amount of the payment should be based on the ability of the entity to pay a deposit, not on the market size or the amount of spectrum.

V. A GRACE PERIOD TO CURE DEFAULTS IN PAYMENT OF THE BID PRICE SHOULD BE GIVEN TO SMALL BUSINESSES

The FCC seeks comments on how defaults on installment payments to the government should be treated. As Congress recognized diversity in licensing and the inclusion of small

businesses in providing spectrum-based services in particular is in the public interest. These businesses will have the greatest challenge in turning the opportunity to provide PCS into a successful and unfaltering business opportunity.

FiberSouth recommends that the FCC provide a grace period for small businesses that default on any payments to the government. Many small businesses operate at a loss in the early years of operation. The Commission's competitive bidding rules should recognize that harsh reality by establishing a grace period and providing for notice of default. Specifically, the rules should provide that small business PCS licensees will be given notice of default within a specific time period and provide small business licensees a minimum grace period of six months to cure any defaults. During that grace period, restructuring of the payment terms should be permitted and additional assistance offered to aid the licensee in curing the defaults and improving its business operation.

VI. CONCLUSION


PCS and other spectrum-based services on the horizon provide a new opportunity for small business growth and ingenuity. This opportunity will be lost, however, if the Commission defines small business too loosely or hampers construction of the necessary infrastructure by requiring immediate payment of bid installments. The FCC can promote small business participation in PCS in the final competitive bidding rules by:

- using the SBA's net worth/net income definition of small business and valuating net worth as of September 23, 1993;
- providing small businesses a two-year period to construct their PCS networks before the first installment payment of the bid price becomes due;

- clarifying that designated entities, including small businesses, do not have to pay the pre-auction deposit required of other bidders; and
- providing notice of default and a six month grace period to small business PCS licensees.

Respectfully submitted,

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